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In the Supreme Court of the United States

OCTOBER TERM, 1994

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.;
AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITION FOR A WRIT OF CERTIORARI

JAMES H. GIDLEY
THOMAS W. BROWN
Cosgrave, Vergeer & Kester
Thirteenth Floor
Bank of America Financial Center
121 SW Morrison Street
Portland, Oregon 97204
(503) 323-9000

ANDREW L. FREY*
CHARLES ROTHFELD
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

JEFFREY R. BROOKE
PAUL G. CEREGHINI
Bowman & Brooke
Suite 2100
100 West Clarendon
Phoenix Townehouse
Phoenix, Arizona 85013
(602) 248-0899

Counsel for Petitioners
**Counsel of Record*

41 pp

QUESTIONS PRESENTED

1. Whether the refusal of the Oregon courts to review compensatory damages verdicts for excessiveness violates the Due Process Clause of the Fourteenth Amendment.

2. Whether the punitive damages imposed in this case are excessive.

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OPINION BELOW

The opinion of the Oregon Supreme Court on remand from this Court (App., *infra*, 1a-13a) is reported at 320 Or. 544 and 888 P.2d 8.

JURISDICTION

The decision of the Oregon Supreme Court was rendered on February 2, 1995, and a timely petition for reconsideration was denied on March 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

At an earlier stage of this case, the Court held in *Honda Motor Co., Ltd.* v. *Oberg*, 114 S. Ct. 2331 (1994) ("*Oberg I*"), that the Due Process Clause requires judicial review for excessiveness of punitive damage awards; the Court found Oregon's denial of such review unconstitutional. On remand from this Court, the Oregon Supreme Court nevertheless held that judicial review of *compensatory* damages verdicts remains unavailable in Oregon; it accordingly failed to consider the claim that the compensatory damages in this case are excessive. That conclusion plainly was wrong. In addition, on remand the court below upheld the $5 million punitive award in this case, rejecting an excessiveness claim that is similar in many respects to the one now before the Court in *BMW of North America, Inc.* v. *Gore*, No. 94-896. As to that issue, it would be appropriate (if the Court does not grant review to consider the issue of review of compensatory damages) for the Court to hold this petition and dispose of it as appropriate in light of the decision in *Gore*.

1. Respondent Karl Oberg was injured after a three-wheeled all-terrain vehicle ("ATV") manufactured and sold by petitioners (collectively "Honda")[1] overturned on him while he was attempting to ride up a steep embankment. He subsequently brought this suit against Honda, demanding $19,390.39 in special damages (his medical expenses), $900,000 in compensatory general damages (principally for pain and suffering), and $5 million in punitive damages. See *Oberg I*, 114 S. Ct. at 2334. The case was tried to a jury, which was presented with evidence purporting to show that tens of thousands of persons suffered injuries associated with ATV use. *E.g.*, Tr. 21:2377-2379. Counsel for Oberg emphasized this evidence repeatedly during summations (see

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[1] A complete listing of Honda Motor Co., Ltd.'s, subsidiaries is set forth at Pet. App. 15a-18a.

Tr. 24:2792, 24:2914-2915) and expressly urged the jury to punish Honda for causing those injuries (Tr. 24:2760):

> [Y]ou have the job of sending a message on behalf of hundreds, maybe thousands of other victims who have been or who may yet be injured by three-wheeled vehicles, a message to these defendants that that product is unsafe, that their conduct with respect to that product has not been up to par, that we believe their conduct has been so far from par that it is wanton and reckless.

Oberg's counsel also emphasized during his closing argument that Honda's net worth was some $4.9 billion. Tr. 24:2838.

At the close of trial, the judge instructed the jury as follows regarding the amount of compensatory damages it could award: "The law does not furnish you with any fixed standard by which to measure the exact amount of general damages. The law does require that all compensation allowed be reasonable. You must apply your own considered judgment to determine the amount." Tr. 24:2942. The court added that in calculating general damages the jury should consider "all past physical and mental pain and suffering," "the extent to which plaintiff's injuries will impair his ability to work and perform labor in the future," "any interference with plaintiff's normal and usual activities," and "the amount of future medical treatment" likely to be sought by the plaintiff. *Ibid.*[2]

The jury awarded Oberg the $919,390.39 in compensatory damages and $5 million in punitive damages sought in the complaint. Because the jury found Oberg 20%

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[2] The jury was instructed that in setting a punitive award it could consider, among other things, "the duration of [Honda's] misconduct" and "the financial condition of the defendant[s]." *Oberg I*, 114 S. Ct. at 2334 n.1. The jury also was charged that special damages include "[t]he reasonable value of medical care and services furnished in the treatment of plaintiff." Tr. 24:2943.

at fault, the trial court reduced the compensatory award to $735,512.31 pursuant to Oregon's comparative negligence statute. See *Oberg I*, 114 S. Ct. at 2334.

Honda then filed motions for a new trial and for judgment notwithstanding the verdict, arguing that the compensatory and punitive verdicts were excessive. The trial court denied the motions without comment. The Oregon Court of Appeals affirmed the judgment, concluding that the Oregon Constitution prohibits both trial and appellate courts in that State from setting aside a verdict on the ground that it is excessive. 814 P.2d 517, 524 (1991). The Oregon Supreme Court affirmed in turn on the same ground. 851 P.2d 1084 (1993). See *Oberg I*, 114 S. Ct. at 2334.

Honda then filed a petition for certiorari, presenting the question "[w]hether Oregon's denial of any judicial review of compensatory and punitive damages verdicts for excessiveness violates the Due Process Clause of the Fourteenth Amendment." No. 93-644, Pet. i. This Court granted the petition, reversed the judgment of the Oregon Supreme Court, and remanded for further proceedings, explaining:

> A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment. The common law practice, the procedures applied by every other State, the strong presumption favoring judicial review that we have applied in other areas of the law, and elementary considerations of justice, all support the conclusion that such a decision should not be committed to the unreviewable discretion of a jury.

114 S. Ct. at 2342. In reaching this conclusion the Court emphasized the long history of judicial excessiveness review; while the Court did not expressly address the question whether the Due Process Clause requires judicial review of the amount of compensatory damages awarded by a jury, it

noted that "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the twentieth century." *Id.* at 2336 n.2.

2. On remand Honda filed supplemental briefs (1) proposing an appropriate standard for reviewing punitive damages awards; (2) asserting that this Court's analysis in *Oberg I* mandates the conclusion that state courts must review the size of compensatory as well as punitive damages; (3) requesting a further remand so that the trial court could consider Honda's excessiveness claims in the first instance; and (4) explaining briefly why Honda has powerful arguments that the compensatory and punitive damages in this case are in fact excessive. But the Oregon Supreme Court, disregarding those submissions, reinstated the punitive and compensatory awards without modification. App., *infra*, 1a-13a.

The Oregon Supreme Court began by stating the standard for reviewing punitive damages that it believed to be compelled by the Due Process Clause. The court held that "the legal standard to apply to post-verdict judicial review of a jury's award of punitive damages is as follows: Was the award of punitive damages within the range that a rational juror would be entitled to award in light of the record as a whole?" *Id.* at 7a. The court declined to "extend" this approach to the award of compensatory damages, however, stating that such awards remain unreviewable in Oregon. *Id.* at 4a n.6.

Applying its rationality standard to the record here, the Oregon Supreme Court next declined to disturb the punitive award. The court pointed to evidence in the record purporting to show that Honda knew its ATVs were likely to cause injuries, that Honda was aware that "ATVs were experiencing accidents and tipovers," that "an agency of the United States government undertook to investigate the safety of ATVs," that "defendants profited from sales of ATVs that

defendants knew or should have known were inherently dangerous," that "numerous injuries were occurring from the use of ATVs and that many of those injuries resulted from rearward tipovers," and that "defendant manufacturer's net worth was $4.9 billion at the time of trial." App., *infra*, 10a-11a. The court found that this evidence justified the $5 million punitive award.

Honda then filed a petition for reconsideration asking the court to revisit its "holding that the amount of compensatory damages remains unreviewable in Oregon." Reh'g Pet. 2 n.2. The petition also argued that the Oregon Supreme Court's decision on punitive damages "overlooks a crucial element of the rationality calculus — the fact that numerous other persons injured while using ATVs manufactured by Honda would have as much right to bring suit and seek punitive damages as Oberg did." Reh'g Pet. 3. On the latter point, the petition noted that this Court recently had granted review in *BMW of North America, Inc.* v. *Gore*, No. 94-896, 115 S. Ct. 932 (1995), and that the "decision in *Gore* may provide guidance on the proper administration of punitive damages in the mass tort context." Reh'g Pet. 4 n.3. The court below nevertheless denied the petition for reconsideration without opinion. App., *infra*, 14a.

REASONS FOR GRANTING THE PETITION

A. The Due Process Clause Requires Judicial Excessiveness Review Of A Jury's Award Of Compensatory Damages

Although this Court did not expressly address the point in *Oberg I*, it had granted review in that case on the question whether the Due Process Clause requires judicial excessiveness review of compensatory as well as punitive damages verdicts. And the Court's analysis in *Oberg I* compels the conclusion that such review is constitutionally mandated. The Court's holding that due process principles require review of punitive awards turned in large part on the

finding that judicial review is a "traditional procedure[]" (114 S. Ct. at 2335) that historically has been regarded as an essential check on jury error. See *id.* at 2335-2338. Moreover, as the Court explained, "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the twentieth century." *Id.* at 2336 n.2. Because judicial review of compensatory awards for excessiveness was provided in every common law jurisdiction prior to the ratification of the Fourteenth Amendment to the United States Constitution — "the 'crucial time for present purposes'" (*id.* at 2342 n.12 (citation omitted)) — such review must be regarded as a "basic procedural protection[]" that is guaranteed by the Due Process Clause. See also *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2727 (1993) (Scalia, J., joined by Thomas, J., concurring) ("[p]rocedural due process also requires, I am certain, * * * judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering)").

The other considerations cited by the Court in *Oberg I* confirm this conclusion. The Court noted that "the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries." 114 S. Ct. at 2340. Speaking of punitive damages, the Court also recognized that "[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Id.* at 2340-2341.

These factors plainly bear on the compensatory award in this case. While jury discretion is substantially restricted where special damages (such as medical bills or lost earnings) are concerned, the factors that may lead juries astray when awarding punitive damages are equally present when the plaintiff seeks a compensatory award for intangibles such as

pain and suffering. "Medical expense and economic loss do have some objective reality but the warrant to add pain and suffering gives the jury immediate freedom to price the injury subjectively." Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St. L.J. 158, 161 (1958). Here, for example, the jury was told that "[t]he law does not furnish you with any fixed standard by which to measure the exact amount of general damages." Tr. 24:2942. And bias against corporate defendants may well infect such a compensatory award, a danger that is especially acute when, as in this case, the defendant is a well-known foreign-owned corporation whose net worth has been spread before the jury as part of the punitive damages presentation. As Judge Jerome Frank observed, "[t]hat the defendant is a wealthy corporation and the plaintiff is a poor boy * * * often determine who will win or lose." J. Frank, *Law and the Modern Mind* 177-178 (1949).[3]

This issue is of considerable practical importance. Judicial excessiveness review is an essential safeguard against arbitrary deprivations of property in virtually all cases where damages are sought (and assuredly is crucial in every case

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[3] Juries thus sometimes "appl[y] evidence incorrectly, award[] compensation for expenses they were not supposed to consider, and consider[] extralegal factors in determining liability and punitive awards." M. Selvin & L. Picus, *The Debate Over Jury Performance: Observations From a Recent Asbestos Case* ix (1987). More generally, it seems clear from the work of social scientists that juries "are occasionally biased against corporate defendants." Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 224, 246 (1989). See A. Chin & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 42-45 (1985) (in personal injury trials, corporate and governmental defendants more likely to be found liable and to be required to pay larger damages); Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Human Behavior 151 (1989) (same).

where the damages are unliquidated). Defendants in Oregon are now denied this protection. This preclusion of review affects many thousands of cases each year.[4] Review of the decision below by this Court therefore is in order.[5]

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[4] Figures provided by the Oregon state court administrator indicate that in 1994 there were more than 4000 personal injury cases, more than 1000 negligence actions, and many hundreds of discrimination, fraud, malpractice, and products liability actions filed in Oregon trial courts.

[5] It should be added that Honda has very substantial arguments that the compensatory award in this case was excessive. Oberg was hospitalized for 10 days after the accident; in the next six months he had only four follow-up visits with his principal treating doctor and thereafter sought no further care until his attorney told him to go in for additional evaluation. Tr. 4:305, 320-321. Although Oberg asserts permanent cognitive impairment, four months after the accident (and prior to plaintiff's lawyer becoming involved in his health care), Oberg's doctor found nothing justifying neurological evaluation and subsequently wrote in his notes, "everything looks quite good." Tr. 4:326-328. Oberg was driving cars, trucks, and dune buggies within three months of the accident. Tr. 4:323, 13:1489. He held and left eight jobs between the time of the accident and the date of trial; he either quit or was terminated for tardiness or misconduct at each. He represented to at least one employer that he had no "conditions, limitations, impairments, or disabilities" that might interfere with satisfactory work performance. Tr. 13:1490-1491; Ex. 252. In 1988, three years after the accident, Oberg told his treating physician that "he was not handicapped in any of his physical activities." Tr. 4:331. Oberg's complaint that he looked "different" after the accident was less than compelling: he testified that "I thought I was a pretty good-looking guy then, and I'm sure people might think I'm good looking now. But I figure I was better looking then than I am now." Tr. 10:1085-1086.

B. The Punitive Award In This Case Is Excessive

While the court below did review the punitive damages, it left intact a punitive exaction that is so excessive as to violate the Due Process Clause. Indeed, the grounds on which Honda challenges the punitive damages here are substantially similar in crucial respects to those advanced by the petitioner in *Gore*, in which the Court recently granted review to consider an excessiveness claim. As in *Gore*, the judgment in this case is based in large part upon injuries suffered by numerous other individuals nationwide, each of whom may be entitled to bring his or her own lawsuit seeking punitive damages for precisely the same conduct that was said to justify the punishment of Honda here. As in *Gore*, it appears that the defendant in this case has been subjected to punishment for actions that were not sanctionable in many of the States where they occurred. And as in *Gore*, all of the relevant objective indicia in this case indicate that the punitive award was excessive. If the Court does not grant review to consider the compensatory damages issue in this case, it therefore would be appropriate for the Court to hold this petition pending disposition of *Gore*.

1. The jury in this case was presented with evidence purporting to show that tens of thousands of persons suffered injuries associated with ATV use. *E.g.*, Tr. 21:2377-2379. Counsel for Oberg emphasized this evidence repeatedly in his closing argument (see Tr. 24:2792, 24:2914-2915) and expressly urged the jury to punish Honda "on behalf of hundreds, maybe thousands of other victims who have been or who may yet be injured by three-wheeled vehicles." Tr. 24:2760. For its part, the court below upheld the punitive award because, among other things, ATV use caused "numerous injuries." App., *infra*, 11a. But this punitive judgment — which is based on a course of conduct that (purportedly) gave rise to many injuries — is fatally flawed because it provides no assurance that Honda will not be sanctioned repeatedly for the impact of its conduct on the

same persons. If Oberg is entitled to a $5 million judgment, others who have been injured by Honda's sale of ATVs presumably are as well. This means that even if Oberg's claim as to the magnitude of the hazard Honda created (tens of thousands of ATV-associated injuries) were substantially discounted, and if it were assumed that a total of 5,000 persons suffered injuries comparable to his in rollover accidents during the period of three-wheeled ATV use, a $5 million award to Oberg could be justified only if total punitive damages of *$25 billion* would not be excessive for Honda's course of conduct. We doubt that even Oberg would make such a claim.

For the reasons explained by petitioner in *Gore* (at No. 94-896, Pet. Br. 45-50), it is no answer to this problem to suggest that Honda may escape multiple punishment because it might not be found liable in other cases.[6] To the contrary, that observation simply highlights the unfairness of the approach taken by the court below. In fact, the jury's finding of punitive liability in this case *is* manifestly aberrational. More than 60 products liability actions against Honda involving ATV accidents have gone to judgment. In a substantial majority of them Honda was found *not liable at all*. And only three juries, including the one in this case, have ever returned verdicts imposing punitive damages against Honda.[7] The other two settled after trial and were not reviewed on appeal; this case thus is the only one in which punitive damages were upheld following appeal.

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[6] For the reasons also explained by the petitioner in *Gore* (at Br. 47-49), a court cannot avoid this problem by upholding the punishment in the case before it while deferring concerns about excessive, repetitive punishment to future cases.

[7] *Artrip* v. *American Honda Motor Co., Inc.*, No. F87-00265 (N.D. Ind.); *Ferris* v. *American Honda Motor Co., Inc.*, C672437 (Los Angeles Cty. Super. Ct.).

Against this background, it would be perverse to hold that Honda's punishment may be enhanced in this case because its actions caused "numerous injuries" when the actions causing those injuries have themselves been repeatedly found *not* to warrant punishment. Instead, fundamental fairness requires that the plaintiff's recovery be limited to a reasonably apportioned share of total potential punitive liability.

2. The punitive award here also is flawed for a second, related reason: as in *Gore*, the defendant in this case was punished for conduct occurring in other States that was not shown to have been sanctionable where it occurred. The jury here was urged to punish Honda "on behalf of hundreds, maybe thousands of other victims," and the court below upheld the award by pointing to the "numerous injuries" associated with ATV use. But the vast majority of those injuries, of course, occurred outside of Oregon. And as the petitioner in *Gore* explains (at Br. 16-17 n.5), some States do not permit punitive damages at all, while others allow their imposition only in cases where the defendant's conduct was so egregious as to amount to criminality. Against this background, the sort of extraterritorial punishment imposed in this case, which turned on the application of Oregon law to punish conduct that took place in other States even though that conduct may not have been sanctionable under the law of those States, violates the Constitution.

3. Finally, even apart from concerns about multiple or extraterritorial punishment, the punitive award here is excessive because it is far "greater than reasonably necessary to punish and deter." *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991). As also is true in *Gore* (see Pet. Br. 29-44), the punitive judgment in this case bears no reasonable relationship to the actual or potential harm to the plaintiff, to the nature of the defendant's conduct, to the range of penalties that legislatures have provided for similar improprieties, or to any other appropriate criterion for testing the reasonableness of a punishment.

First, the punitive damages here are disproportionate to the harm suffered by the plaintiff. They are 5½ times the jury's valuation of Oberg's injuries (which, we submit, Honda would show to be grossly excessive if given the chance), 20% of which are attributable to Oberg's own negligence. While a somewhat lower ratio (4:1) was said to be "close to the line" separating constitutional from unconstitutional punishment in any case (*Haslip*, 499 U.S. at 23), it is especially troubling where, as here, repetitive punishment is possible. Moreover, the $5 million punitive damages award is more than *500* times Oberg's economic damages.[8]

Second, the conduct for which Honda has been punished — selling ATVs with knowledge that a certain number of people inevitably would be injured riding them — is minimally reprehensible. In fact, when looked at in terms of injuries per vehicle, ATVs are no more dangerous than minibikes, trailbikes, and snowmobiles. See Tr. 21:2408, 2410. It therefore is no surprise that several courts have concluded *as a matter of law* that Honda's conduct with regard to ATVs was not sufficiently egregious to justify submitting a punitive damages claim to a jury at all. See, *e.g.*, *LaPlante* v. *American Honda Motor Co.*, 27 F.3d 731, 745 (1st Cir. 1994) ("no reasonable juror could have found, at the close of plaintiff's punitive damages evidence, that Honda acted maliciously, in bad faith, or with the intent to

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[8] Where, as here, the compensatory damages are composed largely of "soft" — that is, non-economic — damages, the permissible ratio of punitive to compensatory damages generally should be smaller than if the compensatory damages are essentially all "hard" damages. See *Crookston* v. *Fire Ins. Exchange*, 817 P.2d 789, 811-812 & n.29 (Utah 1991). Alternatively, overpunishment could be avoided by requiring that punitive damages bear a reasonable relationship to economic (special) damages.

cause harm"); *Hopkins* v. *American Honda Motor Co.*, Nos. 92-1432-CIV-T-24(B), 94-360-CIV-T-25(B), Opinion at 7 (M.D. Fla. Nov. 2, 1994) ("[i]t is hard to believe that, if the ATV's were so dangerous that their distribution satisfied Florida's standard for punitive damages, Judge Gesell would have approved the settlement and left them on the market"); *Brownwood* v. *Honda Motor Co.*, No. 92-1445-Civ-T-24(C), Order at 9 (M.D. Fla. Jan. 12, 1995) ("[t]he Defendant's behavior fails to evidence the character of negligence necessary for imposing punitive damages").[9]

Indeed, while the court below upheld the punitive award in this case on the ground, among others, that "an agency of the United States government undertook to investigate the safety of ATVs" (App., *infra*, 10a), the court failed to note that the agency (the Consumer Product Safety Commission) ultimately entered into a consent decree with Honda on terms that did *not* involve any recall of ATVs. As Judge Gesell of the United States District Court for the District of Columbia explained in approving the settlement:

> [T]he government's decision to settle was made deliberately, after reviewing extensive factual materials and receiving expert, disinterested advice. * * * [T]he government candidly states that its ultimate prospects in the litigation remain uncertain because there are both factual and novel legal obstacles to overcome. This is a correct appraisal.

United States v. *American Honda Motor Co.*, 143 F.R.D. 1, 6 (D.D.C. 1992). The CPSC subsequently terminated its

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[9] See also *Utt* v. *Honda Motor Co., Ltd.*, No. 93-3157-CV-S-4 (W.D. Mo. Jan. 17. 1995) (claim for punitive damages dismissed); *Lute* v. *Honda Suzuki of Jackson*, No. 93-CI-178 (Ohio Ct. Common Pleas Nov. 3, 1994) (same); *Gosewisch* v. *American Honda Motor Co., Inc.*, No. 199193 (Ariz. Super. Ct. Sept. 21, 1988) (same).

investigation of ATVs without taking any action against them — expressly declining to label them hazardous products that should be banned, recalled, or repaired. See 46 Fed. Reg. 47166 (1991). Whether or not the CPSC's case had any merit at all, its concession that its position was no better than debatable makes clear that Honda did not act unreasonably in resisting the Commission's regulatory efforts.

Third, other objective indicia point toward the conclusion that the punitive award here is excessive. At the time it was returned, the verdict in this case was significantly larger than any other reported punitive verdict in Oregon history. Similarly, the punitive judgment exceeds by a factor of 50 the maximum fine for equivalent *criminal* conduct. See ORS 163.185 (maximum fine of $100,000 for criminal assault).

In sum, given the similarities between this case and *Gore*, it would be appropriate (if the Court does not grant review to resolve the compensatory damages claim) for the Court to hold the petition in this case pending disposition of *Gore*, and to vacate the decision below if the petitioner prevails in *Gore*. Alternatively, if the Court does not reach the excessiveness issue in *Gore*, this case presents an excellent opportunity for addressing that extremely important question in the multiple victim context.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold the petition pending disposition of *BMW of North America, Inc.* v. *Gore*, No. 94-896, and should dispose of this case as appropriate in light of the decision in *Gore*.

Respectfully submitted.

JAMES H. GIDLEY
THOMAS W. BROWN
Cosgrave, Vergeer & Kester
Thirteenth Floor
Bank of America Financial Center
121 SW Morrison Street
Portland, Oregon 97204
(503) 323-9000

ANDREW L. FREY*
CHARLES ROTHFELD
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

JEFFREY R. BROOKE
PAUL G. CEREGHINI
Bowman & Brooke
Suite 2100
100 West Clarendon
Phoenix Townehouse
Phoenix, Arizona 85013
(602) 248-0899

Counsel for Petitioners
**Counsel of Record*

MAY 1995